IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 02-20073-05-JWL**
	)	**04-3188-JWL**
OSCAR GARCIA,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM AND ORDER

Oscar Garcia brought this motion to vacate his sentence pursuant to 28 U.S.C. § 2255 (Doc. 165), alleging that his original conviction should be vacated because he received ineffective assistance of counsel in violation of his rights under the Sixth Amendment. In particular, Mr. Garcia alleges that his counsel's performance during plea negotiations was deficient because she advised him to enter into a guilty plea that contained a waiver of his right to appeal his sentence. He further argues that he was prejudiced by this allegedly deficient performance because the sentencing court erroneously declined to grant his request for a downward adjustment for his role in the offense.

The motions, files and record of this case, however, conclusively show that Mr. Garcia is entitled to no relief. Contrary to Mr. Garcia's claim, the sentencing court granted his request for a downward adjustment for his role in the offense. Thus, even assuming that counsel's performance was deficient (a conclusion which the court does not reach), he suffered no prejudice as a result of the waiver contained in his plea agreement.

BACKGROUND

On September 19, 2002, the Grand Jury returned a Superseding Indictment charging Mr. Garcia with: (1) conspiring to distribute and possess with intent to distribute 50 grams or more of methamphetamine; and (2) conspiring to distribute and possess with intent to distribute 100 grams or more of heroin.

On May 2, 2003, the government filed a Third Information against Mr. Garcia, alleging that he used a telephone to facilitate the distribution of heroin in violation of federal law. On that same day, Mr. Garcia entered a plea of guilty to the count charged in the Third Information, pursuant to a plea agreement with the government.[1] In paragraph 9 of this agreement, the defendant agreed that he was "knowingly and voluntarily waiv[ing] any right to appeal or collaterally attack any matter in connection with this prosecution and sentence."

During the plea hearing, the court informed Mr. Garcia that the terms of the plea agreement were merely recommendations to the court, and that they were not binding. In particular, the court informed him that it could impose a sentence that might be different than what is recommended in the plea agreement, without permitting Mr. Garcia to withdraw his plea. Additionally, the court informed Mr. Garcia that by entering a plea of guilty, he "will have waived or given up [his] right to appeal the sentence imposed or to later make an attack or to challenge the sentence." Mr. Garcia acknowledged to the court that he understood these particular ramifications.

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[1] Mr. Garcia executed a waiver of his right to an indictment by Grand Jury during the change of plea hearing.

The Presentence Investigative Report ("PSR") contemplated an adjusted offense level of 23 and a criminal history category III, resulting in a guideline sentence ranging from 57 to 71 months. Because Mr. Garcia's offense of conviction contains a statutory maximum of 48 months, the PSR recommended a sentence at the statutory maximum. The PSR did not include any downward adjustment for Mr. Garcia's role in the offense. Mr. Garcia objected to the Presentence Investigative Report, arguing that he should receive a four-level reduction as a "minimal participant" in the offense, pursuant to U.S.S.G. § 3B1.2(a).

On July 15, 2003, the court sentenced Mr. Garcia. During the hearing, the court sustained Mr. Garcia's objection to the PSR, and granted him a four-level reduction as a minimal participant in the offense. As a result, Mr. Garcia's adjusted offense level was reduced from 23 to 19, resulting in a guideline sentence range from 37 to 46 months. The court sentenced Mr. Garcia to a 46-month term of incarceration, the high end of the guideline range.

Mr. Garcia filed a motion to vacate his sentence under 28 U.S.C. § 2255 on June 8, 2004. The government filed its response on July 22, 2004.

STANDARD

Section 2255 entitles a prisoner to relief when "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255. Such relief, however is "not available to test the legality of matters which should have

been raised on direct appeal," and "[a] defendant's failure to present an issue on direct appeal bars him from raising the issue in his § 2255 motion, unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed." *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994).

"The standard of review of Section 2255 petitions is quite stringent," and "[t]he court presumes that the proceedings which led to defendant's conviction were correct." *United States v. Nelson*, 177 F. Supp. 2d 1181, 1187 (D. Kan. 2001)(citing *Klein v. United States*, 880 F.2d 250, 253 (10th Cir.1989)). "To prevail, defendant must show a defect in the proceedings which resulted in a 'complete miscarriage of justice.'" *Id.* (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

DISCUSSION

According to Mr. Garcia, "[t]he sole issue presented in his motion to vacate is whether counsel was ineffective for advising petitioner to enter into a plea agreement that waived petitioner's right to appeal a sentence imposed which is within the guideline range determined appropriate by the court."

I. Legal Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two-prong inquiry for evaluating claims of ineffective assistance of counsel. Under *Strickland*, Mr. Garcia must show that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. "In applying this test, we give considerable

deference to an attorney's strategic decisions and 'recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Bullock v. Carver*, 297 F.3d 1036, 1044 (10th Cir. 2002) (quoting *Strickland*, 466 U.S. at 690).

Second, Mr. Garcia "must show that counsel's deficient performance prejudiced the defense, depriving the petitioner of a fair trial with a reliable result." *Le v. Mullin*, 311 F.3d 1002, 1024-25 (10th Cir. 2002). Under this prong, Mr. Garcia must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1025 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bullock*, 297 F.3d at 1044. The court "may address the performance and prejudice components in any order, but need not address both if [Mr. Garcia] fails to make a sufficient showing of one." *Cooks v. Ward*, 165 F.3d 1283, 1292-93 (10th Cir. 1998).

II. Application of the Standard

Here, Mr. Garcia contends that counsel's performance was constitutionally deficient because she advised him to accept a plea bargain that contained a waiver of his right to appeal his sentence. As a result, Mr. Garcia believes that he suffered legal prejudice because the court wrongfully overruled petitioner's objection to the PSR's failure to include a four-level downward adjustment for his role in the offense. A review of the sentencing transcript, however, reveals that the sentencing court did, in fact, sustain Mr. Garcia's objection and granted him a four-level adjustment for his role as a "minimal participant" pursuant to §

3B1.2(a). As a result, his guideline sentence range was reduced from 57 to 71 months to 37 to 46 months. Contrary to petitioner's allegations, the court sentenced him to a 46-month term of imprisonment (the high end of the guideline range, after the role adjustment). Mr. Garcia's motion and supporting memorandum contain no other allegations of prejudice. As such, the motion and the files and record conclusively establish that petitioner is entitled to no relief, and the court denies his motion in its entirety.

IT IS THEREFORE ORDERED BY THE COURT that Mr. Garcia's motion to vacate his sentence pursuant to § 2255 (Doc. 165) is denied.

IT IS SO ORDERED this 17th day of August, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge